FILED
DEC 26 2007
OFFICE OF THE CLERK
SUPREME COURT U.S.

(3)

No. 07-259

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Question Presented Requires Interpretation Of Federal Immigration Statutes And Regulations. 2

B. Resolution Of The Question Presented Applies Broadly To Thousands Of Immigration Cases Every Year 4

C. The Second Circuit's Rule Is Inefficient And Unfair. 5

D. The Attorney General's Issuance Of A Proposed New Regulation Regarding Voluntary Departure Provides No Basis For Denying Review In This Case. 7

E. If the Court Does Not Grant Review, It Should Hold This Case Pending Disposition Of No. 06-1181, *Dada* v. *Mukasey*. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Alimi v. *Ashcroft*, 391 F.3d 888 (7th Cir. 2004) 3
Baena v. *Gonzales*, 235 Fed. App'x 646 (9th Cir. Aug. 22, 2007) 5
Bocova v. *Gonzales*, 412 F.3d 257 (1st Cir. 2005) 2
Castillo-Perez v. *I.N.S.*, 212 F.3d 518 (9th Cir. 2000) 7
Dada v. *Mukasey*, No. 06-1181 ..... 10, 11
Desta v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004) 3, 4, 7
Elia v. *Gonzales*, 431 F.3d 268 (6th Cir. 2005) 1
Foti v. *INS*, 308 F.2d 779 (2d Cir. 1962) 6
Kanivets v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005) 11
Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988) 7
Macotaj v. *Gonzales*, 424 F.3d 464 (6th Cir. 2005) 7
Massachusetts Trustees v. *United States*, 377 U.S. 235 (1964) 10
Obale v. *Att'y Gen.*, 453 F.3d 151 (3d Cir. 2006) 7
Onikoyi v. *Gonzales*, 454 F.3d 1 (1st Cir. 2006) 1
Rabiu v. *I.N.S.*, 41 F.3d 879 (2d Cir. 1994) 7
Saakian v. *I.N.S.*, 252 F.3d 21 (1st Cir. 2001) 7
Sidikhouya v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005) 11

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

8 U.S.C.]§ 1229c 3
8 U.S.C. § 1252(b)(3)(B) 3
8 C.F.R. § 1003.2(f) 11
8 U.S.C. § 1182(a)(9)(A) & (B) 9
8 U.S.C. § 1229c(b)(2) 9
8 U.S.C. § 1229c(f) 4
8 C.F.R. § 1240.26(d) 2, 3
58 Fed. Reg. 6074-01 (Jan. 25, 1993) 9
66 Fed. Reg. 7702-01 (Jan. 20, 2001) 9
72 Fed. Reg. 67,674 (2007) 8, 9
72 Fed. Reg. 67,686 (2007) 9

MISCELLANEOUS

Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City*, Washington Post, Dec. 14, 2004 10

U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book* (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. 4

PETITIONERS' REPLY BRIEF

The government acknowledges the sharp conflict in the courts of appeals on the question presented in the petition, recognizing that the decision below accords with holdings of the First and Seventh Circuits and directly conflicts with holdings of the Sixth, Eighth, and Ninth Circuits. Opp. 11, 13-14. The government does not dispute that if petitioners had sought review in the Sixth, Eighth, or Ninth Circuits, today they would be lawful permanent residents of the United States. But because petitioners' case instead was decided in the Second Circuit, they are now subject to expulsion from the country. This Court should not tolerate such inconsistency in the application of the Nation's immigration laws.

The hodgepodge of makeweight reasons the government offers to deny review in the face of this circuit conflict are insubstantial.[1] First, as the courts of appeals have expressly acknowledged, the question presented is a substantive issue that turns on application of both statutory and regulatory immigration law. It thus involves far more than the trivial variation in the motions practices of the courts of appeals described by the government. Second, resolution of

---

[1] The government's contention that this case is "unsuitab[le] for review" because it was initiated prior to enactment of IIRIRA (Opp. 12 n.9) is mistaken. The government does not dispute that the REAL ID Act of 2005 repealed the IIRIRA "transitional rules," rendering "pre-IIRIRA" cases indistinguishable from post-IIRIRA cases. See Pet. 4-5. The lower courts uniformly recognize that such cases are identical. See, *e.g.*, *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006); *Elia* v. *Gonzales*, 431 F.3d 268, 272 (6th Cir. 2005). It is beyond dispute that resolution of the question in this case would be broadly applicable to all immigration cases, whether initiated before or after passage of IIRIRA.

the question presented is broadly relevant to the outcomes of hundreds, if not thousands, of cases every year. Additionally, despite the government's contrary assertion, the Second Circuit's decision works great unfairness on petitioners and other similarly situated litigants. Finally, the proposed regulation relating to voluntary departure cited by the government provides no basis for denying review. It conflicts directly with statutory law, is inapplicable to this case, and in any event would not affect the resolution of the many cases that might present this issue that currently are pending before the courts of appeals. Review in this case is therefore warranted.

A. The Question Presented Requires Interpretation Of Federal Immigration Statutes And Regulations.

Contrary to the government's characterization of this case as involving an issue of mere stay practice (Opp. 11, 14), the question presented implicates both statutory law and federal regulations, and at its core concerns a conflict in the interpretation of the purpose of voluntary departure.

1. As we have explained (Pet. 21-23), voluntary departure and removal are complimentary facets of the same administrative order. See *Bocova* v. *Gonzales*, 412 F.3d 257, 267 (1st Cir. 2005). A motion to stay *removal* filed during the period for *voluntary departure* is therefore directed *at* the voluntary departure order – which, at that point, is the only order operating upon the alien. The question presented here therefore directly implicates both statutory law and federal regulations: it asks whether a motion filed under Section 304 of IIRIRA, 8 U.S.C. § 1252(b)(3)(B), to "stay the *removal* of an alien" necessarily also functions as a request to stay voluntary

departure, given that the order of removal and order to depart voluntarily are the *same order* under 8 C.F.R. § 1240.26(d).

For this reason, the courts of appeals have expressly recognized that a request to stay voluntary departure presents a question that is a "substantive" and not merely a "procedural" matter. *Alimi* v. *Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004). The Seventh Circuit, for instance, has held that "extend[ing] the time for voluntary departure" upon a motion to stay removal "would be incompatible with the structure of [18 U.S.C.] § 1229c," which states that "courts have no authority to grant voluntary departure on their own." *Alimi*, 391 F.3d 891-92. Because, in its view, the Sixth, Eighth, and Ninth Circuits' rule upsets the alien's "incentive to depart" under the voluntary departure program, the Seventh Circuit concluded that courts may not "extend the time [for voluntary departure] as a byproduct of" a decision upon a motion to stay only removal. *Id.* at 893.

The Ninth Circuit, by contrast, has concluded that "IIRIRA does not specify the circumstances in which we may issue a stay of voluntary departure," and therefore that there is "no statutory bar to using our equitable powers to construe [a] motion to stay removal as including a request to stay voluntary departure." *Desta* v. *Ashcroft*, 365 F.3d 741, 747-78 (9th Cir. 2004). Because construing a motion to stay removal also to request a stay of voluntary departure does not require the court "to review * * * a decision [of the BIA under 8 U.S.C. § 1229c(f)]," and is therefore permissible under that provision, it "serves the purposes of our asylum law, as well as the interests of justice, to construe motions to stay removal as including motions to stay voluntary departure." *Id.* at 748.

No matter which side has the better of this dispute, the question presented requires the interpretation of both statutory and regulatory law. It is a matter on which uniformity is essential.

B. Resolution Of The Question Presented Applies Broadly To Thousands Of Immigration Cases Every Year.

The government's contention that the question presented is "exceedingly narrow" (Opp. 11) and that the number of cases affected by its resolution is "diminishing significantly" (Opp. 15) is also plainly wrong. Although the government is correct to note "that IJs grant voluntary departure in only 10% of all removal cases" (Opp. 18), IJs resolved more than *220,000* removal cases in 2006.[2] Voluntary departure was therefore granted in more than *22,000* cases in 2006 alone. Moreover, litigants appealed their removal cases to the federal courts of appeals nearly 12,000 times in 2006. The issue presented here could arise in all such cases. *Cf. Desta*, 365 F.3d at 749 (noting that its approach affected "hundreds of aliens").

As we have explained, moreover, the relevance of the resolution of the question presented is not merely theoretical. See Pet. 19. In the Ninth Circuit, every litigant who petitions for review during the voluntary departure period benefits from that court's holding in *Desta* that a motion to stay removal includes a motion to stay voluntary departure. In the four months that have elapsed since this petition was filed, the Ninth Circuit's rule has been applied in at

---

[2] U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

least *thirty-six* cases. See, *e.g.*, *Baena* v. *Gonzales*, 235 Fed. App'x 646, 647 (9th Cir. Aug. 22, 2007). Indeed, the Ninth Circuit has cited *Desta* in more than seven hundred immigration cases since 2004. To the extent that this Court is persuaded by the government's argument that both it and the courts of appeals must have detailed notice of what relief a litigant is seeking (see Opp. 17-19), the government is being prejudiced in every such case. Resolution of the question presented therefore is a matter of great practical importance.[3]

C. The Second Circuit's Rule Is Inefficient And Unfair.

1. The government provides no basis to believe that the Second Circuit's resolution of the question presented is correct. Although the government con-

---

[3] The government is wrong in asserting that this case may not be a suitable vehicle for resolution of the question presented because the court below failed to "act[] on petitioners' motions to stay their orders of removal." Opp. 6-7 n.6. In response to assurances by the government that it will not remove aliens while their appeals are pending, the Second Circuit as a matter of policy does not issue formal stays in immigration cases. *Ibid.* For this reason, both the government and the Second Circuit treated the petitioners' stay motions in this case as granted; neither suggested below that failure to issue a formal stay had any bearing on the question presented here. In fact, the government expressly acknowledges that it "did not argue below that the court of appeals' failure to enter a stay order in this case * * * precluded a holding that petitioners' voluntary departure periods had been suspended [by their motions to stay removal]." *Ibid.* The stay practice of the Second Circuit therefore has no bearing on the suitability of this case fore review. In addition, it would be perverse were the government able, having induced the Second Circuit not to formally rule on stay motions, to use the absence of such rulings as a basis for denying relief on the ground that stays had not formally been entered.

tends that the decision below "works no unfairness in this particular case," plainly it does. Under the panel's rule, petitioners will be expelled from the country simply because they omitted three words – "and voluntary departure" – from the caption of their stay motion. This unfairness is exacerbated by the fact that Second Circuit precedent may reasonably have led petitioners to believe their motion to stay removal necessarily encompassed a request to stay voluntary departure. See Pet. 15-16.[4]

Moreover, the government could not possibly have been in doubt about the relief sought by petitioners or by the innumerable other aliens in their situation. Although the government argues that "the equitable considerations regarding stays may play out differently with respect to" removal and voluntary departure (Opp. 17), it fails to provide a *single* example of how or when the equities would weigh differently in the two situations. It is hard to imagine that they ever would, as the Third, Sixth, and Ninth Circuits have recognized. See, *e.g.*, *Obale* v. *Att'y Gen.*, 453 F.3d 151, 161 (3d Cir. 2006); *Macotaj* v. *Gonzales*, 424 F.3d 464, 467 (6th Cir. 2005); *Desta*, 365 F.3d at 748.

2. Additionally, the government does not dispute that, if its rule prevails, ineffective assistance of counsel claims would be available – under binding

---

[4] The government's observation that *Foti* v. *INS*, 308 F.2d 779 (2d Cir. 1962) involved an *automatic* stay (Opp. 19 n.13) has no bearing on the relevance of that case. *Foti* put petitioners on notice that after a stay of *deportation* is dissolved, aliens retain the opportunity to *depart voluntarily*. Petitioners could not have expected a different rule to apply merely because under prevailing law in 2002, the stay had to be issued by the court rather than by operation of law.

circuit precedent – to aliens whose attorneys fail to file separate motions. Such a result will clog the courts' dockets with unnecessary appeals and provide an end-run around the Second Circuit's resolution of the question presented. See Pet. 25.

The government does contend that "this Court's decisions do not support" ineffective assistance claims in immigration cases. Opp. 18 n.11. But whether this contention is right or wrong (and we suggest that it is incorrect), it is entirely beside the point. As the government concedes, numerous lower courts *do* in fact recognize such claims. See, *e.g.*, *Saakian* v. *I.N.S.*, 252 F.3d 21 (1st Cir. 2001) (allowing motion to reopen before BIA due to ineffective assistance in earlier proceedings); *Rabiu* v. *I.N.S.*, 41 F.3d 879 (2d Cir. 1994) (same); *Castillo-Perez* v. *I.N.S.*, 212 F.3d 518 (9th Cir. 2000) (same). Even the BIA has recognized that "egregious" ineffective assistance of counsel constitutes grounds to reopen. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988). In fact, every circuit to have adopted the Second Circuit's rule regarding the question presented in this case recognizes ineffective assistance of counsel claims in immigration cases. Accordingly, there is every reason to believe that the rule below will prompt a spate of ineffective assistance claims, further burdening the courts' dockets with immigration appeals.

D. The Attorney General's Issuance Of A Proposed New Regulation Regarding Voluntary Departure Provides No Basis For Denying Review In This Case.

Ten days before the government filed its brief in opposition in this case, the Attorney General issued the proposed rule relevant to judicial stays of voluntary departure that is cited in the brief in opposition

(at 15-16). That proposed rule provides no reason to deny review in this case.

First, the regulation cited by the government is only *proposed*. It is entirely speculative if, and in what form, the regulation will be adopted. According the proposed rule, if an alien who has been granted voluntary departure decides to challenge a ruling of the IJ or BIA, the Attorney General will automatically revoke the grant of voluntary departure. 72 Fed. Reg. 67,674. This would present litigants with a Hobson's choice – to either (a) remain in the country illegally while challenging the administrative ruling and, if unsuccessful on appeal, be subject to forced removal; or (b) appeal the administrative ruling after leaving the country, which in some cases may force an alien to return to a country where he or she faces a serious threat of physical harm or death. This controversial proposal will surely be subject to vigorous, prolonged debate with no certainty of ultimate adoption.[5]

Second, the proposed regulation is contrary to federal immigration law, further undermining the likelihood of its adoption. The regulation proposes that an alien "will not be subject to the penalties for failure to depart voluntarily" while appealing an immigration decision. 72 Fed. Reg. 67,674 92007). But the executive has no statutory authority to make this

---

[5] Given the long timeframe necessarily involved with promulgation of a regulation, it is unclear whether – even if approved – the regulation cited by the government would enter into force during the current administration. Both the Clinton and Bush administrations, upon taking office, withdrew all proposed regulations that had not yet gone into force. 58 Fed. Reg. 6074-01 (Jan. 25, 1993) (withdrawing all regulations not finally published); 66 Fed. Reg. 7702-01 (Jan. 20, 2001) (same).

guarantee – these penalties are *required* by statute. See 8 U.S.C. § 1182(a)(9)(A) & (B) (providing ten-year bar to admission if an alien departs the country "while an order of removal was outstanding" or if an alien is "unlawfully present in the United States for one year or more"); *id.* (three-year bar if an alien overstays voluntary departure by "180 days but less than one year"). On its face, the proposed regulation therefore appears squarely to contradict statutory law.

Moreover, the proposed regulation would impermissibly undermine orders by the federal courts of appeals to preserve the status quo pending judicial review. The tentative regulation proposes that if an "alien files a petition for review * * * any grant of voluntary departure shall terminate automatically *upon the filing of the petition.*" 72 Fed. Reg. 67,686 (2007). But when, as here, an alien seeks a stay *before* the filing of the petition for review, the regulation may cancel an order that has already been stayed. As the government admits, the courts have interpreted 8 U.S.C. § 1229c(b)(2) to permit equitable stays precisely to avoid such a result. Opp. 12 & n.8. There accordingly is substantial reason to doubt that the proposed regulation will take effect as promulgated.

Finally, review remains appropriate because the proposed regulation would have no impact on the thousands of cases currently pending before the federal courts of appeals. See, *e.g.*, Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City*, Washington Post, Dec. 14, 2004, at A11 (noting backlog of more than 4,000 immigration appeals in the Second Circuit alone). The government concedes that the

rule would apply prospectively only. Opp. 16. The regulation thus would not apply to the thousands of immigration cases now pending or to the many more that will be filed prior to the hypothetical implementation of the proposed regulation. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964) (review is appropriate where "a considerable number of suits are pending in the lower courts which will turn on resolution of * * * [the] conflict among the circuits as to" the question presented). The question presented thus plainly warrants review.

E. If the Court Does Not Grant Review, It Should Hold This Case Pending Disposition Of No. 06-1181, *Dada* v. *Mukasey*.

Although we believe the importance of the decision below and the lack of uniformity on a significant matter of immigration law warrant the Court's immediate attention, if the Court disagrees it should, at a minimum, hold this case pending disposition of *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008).[6] Much like the present case, *Dada* concerns the interplay between orders of removal and voluntary departure. There, the Court will decide whether "an alien *must* be afforded" a tolling of voluntary departure upon "a timely filed petition to reopen." *Kanivets* v. *Gonzales*, 424 F.3d 330, 335 (3d Cir. 2005) (emphasis added). This question bears on the present case because, although governing regulations permit aliens to "seek an administrative stay of their *removal* orders" during a

---

[6] The government is correct to note that petitioners did not refer to *Dada* in their petition for certiorari. Opp. 20. Petitioners filed their petition on August 22, 2007. This Court granted the petition for certiorari in *Dada* on September 25, 2007.

pending motion to reopen, the regulations do not expressly permit stay of a grant of voluntary departure. *Dada*, Br. of Pet. at 31 (emphasis added) (citing 8 C.F.R. §§ 1003.2(f)). Thus, the Court must decide in *Dada* whether the authorization to issue stays of removal also permits the tolling of voluntary departure. Because that question concerns the relationship between removal and voluntary departure, a consideration that also is at play in this case, the forthcoming decision in *Dada* may illuminate the question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

DECEMBER 2007